MOTION FILED

MAR 2 2 2001

No. 00-1323

In The

Supreme Court of the United States

RUSSELL BRIDENBAUGH, JIM DAVIS, JOHN DAVIS, MELISSA DAVIS, WILLIAM H. FRIDAY, GREGORY KASZA, JOSEPH KEOUGH, LOYCE KEOUGH, DAVID SABBAGH, JOHN SCANLAN, LINDA SIMON, ROBERT SWANSON, MARTHA SYKES,

Petitioners,

v.

STEVE CARTER, Attorney General of Indiana; and GLENN LAWRENCE, Director of the Indiana Alcoholic Beverage Commission, in their official capacities; and WINE & SPIRIT WHOLESALERS OF INDIANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION BY THE COALITION FOR FREE TRADE FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN OPPOSITION TO CERTIORARI

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Motion for Leave to File Brief Amicus Curiae

Applicant, Coalition for Free Trade, hereby respectfully moves for leave to file the attached brief amicus curiae in opposition to the petition for writ of certiorari.[1]

The consent of counsel for the Petitioners was requested and denied. The consent of the Indiana Attorney General's Office, representing the respondent state actors, was obtained. The consent of counsel for Respondent, Wine & Spirit Wholesalers of Indiana, was obtained. The written consents of both are on file with the clerk's office.

Interest of Amicus

The Coalition for Free Trade (CFT) is a California nonprofit corporation formed exclusively for the purpose of addressing the issue of interstate wine shipments to consumers. Its sole mission is to legalize the shipment of wine between licensed wine sellers, such as wineries and wine retailers, and out-of-state consumers. CFT is predominately a winery supported organization although wholesalers, e-commerce and traditional "bricks and mortar" retailers contribute to its efforts.

Both the Petitioners and CFT have the same goal of removing discriminatory trade barriers that prohibit consumers from receiving wine from out-of-state wineries and out-of-state retailers for personal consumption. In

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[1] No counsel for a party authorized this Brief in whole or in part, and no person or entity, other than the Amicus Curiae, made a monetary contribution to the preparation or submission of this Brief.

the Seventh Circuit, CFT filed an amicus brief in support of the Petitioners.

CFT now files this motion and the attached brief in **opposition** to certiorari reluctantly and only after due consideration of the district court and court of appeals records in this case. CFT argues in its brief that a writ of certiorari should not be granted in this case for the following reasons. First, as a prudential matter, the absence of out-of-state wineries and out-of-state wine retailers as plaintiffs makes this case a poor candidate for review by the Court.[2] Second, the record facts in this case are insufficient for purposes of reviewing the delicate interplay between the Commerce Clause and the Twenty-first Amendment. Moreover, the question of interstate wine shipments to consumers would benefit from further development in the district courts and courts of appeal. At present, no conflict exists between the circuits. Six other cases are pending in the district courts regarding this question. Five out of the six cases include out-of-state wineries as plaintiffs. In several of these cases, there has been extensive discovery and fact development relating to the economic and legislative issues not addressed in this case.

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[2] Ancillary jurisdictional issues present may also hamper a consideration on the merits.

WHEREFORE, the Coalition for Free Trade respectfully seeks leave of this Court to file the attached brief in opposition to the petition for writ of certiorari.

Respectfully submitted,

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INTEREST OF AMICUS

The Coalition for Free Trade (CFT) is a California nonprofit corporation formed exclusively for the purpose of addressing the issue of interstate wine shipments to consumers. Its sole mission is to legalize the shipment of wine between licensed wine sellers, such as wineries and wine retailers, and out-of-state consumers. CFT is predominately a winery-supported organization although wholesalers, e-commerce and traditional "bricks and mortar" retailers contribute to its efforts.

Both the Petitioners and CFT have the same goal of removing discriminatory trade barriers that prohibit consumers from receiving wine from out-of-state wineries and out-of-state wine retailers for personal consumption. In the Seventh Circuit, CFT filed an amicus brief in support of the consumer petitioners. While CFT continues to support the Petitioners' goal, a review of the record in this case recommends the Petition be denied.

ARGUMENT

FOR PRUDENTIAL REASONS THIS CASE IS NOT A SUITABLE CANDIDATE FOR EXAMINING THE DELICATE INTERPLAY BETWEEN THE COMMERCE CLAUSE AND THE TWENTY-FIRST AMENDMENT AND CERTIORARI THEREFORE SHOULD BE DENIED.

This case is a consumer challenge to two Indiana statutes that make it unlawful for out-of-state wineries and out-of-state wine retailers to *ship* wine directly to consumers who reside within the state of Indiana. Ind.

Code §§ 7.1-5-11-1.5, 7.1-5-1-9.5. The challenged statutes, however, do not make it unlawful for Indiana consumers to *receive* wine from out-of-state wineries or out-of-state wine retailers.[1] The plaintiffs (i.e. petitioners herein) are thirteen adult, wine-consuming residents of the state of Indiana. No out-of-state winery or out-of-state wine retailer is a party to this case. The defendants (i.e. respondents herein) are the appropriate Indiana state officials, *Ex Parte Young*, 209 U.S. 123 (1908), and the intervening defendant Wine & Spirits Wholesalers of Indiana.

Petitioners assert this case presents "an important federal question that has not been settled by this Court." (Pet. at 3). Importance pursuant to Supreme Court Rule 10, however, is a relative concept and one that escapes easy formulation. "The concept of importance relates, of course, to the importance of the issue 'to the public as distinguished from' importance to the particular 'parties' involved." Robert L. Stern et al., *Supreme Court Practice*, 184 (7th ed. 1993), citing, *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). "There are . . . a wide variety of considerations which may be pertinent in testing the importance of a case." *Stern, id.* One of those considerations is whether the case will provide an adequate framework for deciding an issue so the public may benefit from its decision and not merely the parties.[2]

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[1] There are other statutes that prohibit the consumer side of the transaction, Ind. Code §§ 7.1-5-10-5, 7.1-5-10-7, but the Petitioners have not sought to challenge those statutes. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000).

[2] Parenthetically, the district court did not enter an injunctive order or a declaration of rights providing relief to the

This case does not provide a suitable framework for deciding the question presented for two reasons. First, there are no out-of-state winery or out-of-state wine retailer plaintiffs. Their participation, as a prudential matter, is necessary for a full review of the diverse economic and constitutional injuries resulting from the challenged Indiana statutes. Second, the record facts are insufficient for the Court's review of the question presented.

1. As a Prudential Matter, the Absence of An Out-of-State Winery or Out-of State Wine Retailer As a Plaintiff Makes This Case Unsuitable for Review by The Court.

The record below is suggestive of performing *Hamlet* without the prince. It is not only the protagonist that is missing; it is everything that flows from him. The missing character in this instance is a representative out-of-state winery or out-of-state wine retailer that desires to sell to the petitioners but cannot do so due to the presence of Indiana's discriminatory trade barrier. The absence of these necessary parties has left the record sparse, the issues clouded,[3] and the constitutional and economic injuries sustained by the out-of-state wineries and wine retailers unexamined.

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plaintiffs. It merely entered judgment. *Bridenbaugh v. O'Bannon*, 78 F. Supp.2d 828, 832 (N.D. Ind. 1999).

[3] The presence of certain ancillary jurisdictional issues may hamper consideration of the merits.

Traditionally, the out-of-state business is the target of the discrimination and the one who suffers the most readily discernible constitutional and economic injuries. It is also the out-of-state business that knows the most about the underlying facts and is in the best position to crystallize the issues. In this instance it is the small winery, without adequate distribution or market access, and the independent wine retailer, who has embraced e-commerce, that have suffered the most as targets of the challenged statutes. Approximately one thousand five hundred (1500) small, family-owned wineries throughout the United States rely upon retail sales to out-of-state consumers for economic viability and growth. An unknown number of wine retailers also depend on selling and shipping wine to out-of-state consumers as a significant source of revenue. While these businesses would be the most affected by a decision in this case, their absence has precluded development of a complete set of facts and formulation of a more narrowly crafted question on certiorari.[4]

Without the benefit of an out-of-state winery or out-of-state wine retailer as a plaintiff, the district court was

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[4] The absence of any out-of-state winery as a plaintiff was noted in the appeals court. *Bridenbaugh v. Freeman-Wilson*, supra, 849. The appeals court, however, erred in assuming the out-of-state wineries were not interested in obtaining Indiana permits in order to legally sell and ship wine to Indiana consumers. *Id.* at 854. Contrary to the court's comment, the wineries care a great deal about permits. Two winery organizations, the Coalition for Free Trade and Family Winemakers of California, submitted amici briefs endorsing model legislation that requires out-of-state wineries and out-of-state wine retailers to obtain permits and pay state excise taxes.

denied the opportunity to develop and analyze the facts in a meaningful way. The out-of-state wineries and out-of-state wine retailers most affected by the discrimination were unable to place facts in the record or refute the defenses raised by the Respondents. Eventual resolution of this question by the Court will require a more thorough district court analysis of the economic burden placed upon out-of-state wineries and wine retailers by such statutes and the constitutional injuries sustained.

2. The Record is Insufficient for Review by the Court.

This case is a *bare* facial challenge to the offending statutes. Unlike the extensive factual records in such well known Twenty-first Amendment cases as *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) and *Healy v. The Beer Institute*, 491 U.S. 324 (1989), there are few facts in this record beyond those necessary to demonstrate Article III standing and the state's disparate treatment of out-of-state wineries and wine retailers. Absence of an adequate factual record lends this case to advisory comments and great mischief. The record is simply insufficient for purposes of reviewing the delicate interplay between the Commerce Clause and the Twenty-first Amendment as it relates to wine shipments between out-of-state wine sellers and in-state consumers.

An examination of the district court record reveals the Petitioners developed few record facts concerning out-of-state wineries. The most notable of these facts were those appearing in the petition. (i.e., *"Some of the wine they would like to buy is only available from out of state*

sources such as small wineries and auction houses," [Pet. at 1] and, *"Many of them are small and produce so little wine that no wholesaler will distribute the wines nationally."* [Pet. at 3].) The only other record facts developed by Petitioners regarding out-of-state wineries were eight pro forma winery affidavits indicating they stopped shipping to Indiana consumers on the day the offending Indiana statutes became effective. The court file does not reveal any record facts regarding out-of-state wineries that were developed by Petitioners as a result of nonparty depositions or the subpoena of documents. No experts were designated and no published studies were filed with the district court. *E.g., 44 Liquormart, Inc. v. Rhode Island, supra,* at 493. Further, the district court record does not include any record facts regarding the state mandated trade barriers that confront many small wineries and lie at the heart of the Wall Street Journal and New York Times articles referenced in the Petition. The district court record is also devoid of any record facts regarding state mandated protectionism and how it operates to the benefit of in-state wholesalers.

The Petitioners developed even fewer record facts regarding out-of-state wine retailers. A review of the district court record, including exhibits used for summary judgment, did not reveal any affidavits from out-of-state wine retailers, nor did the district court record indicate that Petitioners developed any record facts regarding out-of-state retailers by deposition or the subpoena of documents. The only facts appearing in the record concerning out-of-state wine retailers are those found in the affidavits of several of the Petitioners to the effect they had previously purchased wine from out-of-

state retailers and could no longer do so because of the enactment of the challenged statutes.[5]

"Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.* 338 U.S. 912, 918 (1950) (Frankfurter, J.). This issue should wait for another day. Currently, six other cases are pending in the district courts regarding interstate consumer wine sales and shipments.

Dickerson v. Bailey, 87 F.Supp.2d 691 (S.D. Tex. 2000)

Bolick v. Roberts, No. 3:99 CV 755 (E.D. Va.)

Swedenburg v. Kelly, No. 00 CV 778 (S.D.N.Y.)

Heald v. Engler, No. 00 CV 71438 (E.D. Mich.)

Beskind v. Hunt, No. 3:00 CV 258 (W.D.N.C.)

Bainbridge v. Bush, No. 99-CV-2681 (M.D. Fla.).

Wineries are plaintiffs in five out of six of these cases. In the sixth case, the consumer plaintiffs developed a comparable record by taking advantage of the willing buyers' and willing sellers' *mutuality of interest, see, General Motors Corp. v. Tracy,* 519 U.S. 278, 287 (1997), in order to broaden the record. In several of the above cases, there has been extensive discovery and fact development relating to the economic and legislative issues not addressed

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[5] The Petitioners' treatment of out-of-state wine retailers is difficult to explain. The focal point of the Petition is the preferential treatment afforded in-state retailers as opposed to out-of-state retailers. Petition at 2, fn. 1.

in this case. At the present time, no conflict exists between the circuits and no federal statute is at issue in this case.

CONCLUSION

As a prudential matter those most burdened by the Indiana statute and best able to argue the issue are not before the Court. It is the small winery and the independent wine retailer that have the greatest economic interest in the outcome of this case. By granting certiorari, those with the most at stake will be deprived of the opportunity to develop the record on which this important issue regarding the interplay between the Commerce Clause and the Twenty-first Amendment will be decided. We submit, in the interests of justice, this question should be given the opportunity to ripen by waiting for a case where the necessary plaintiffs are before the Court and the record is complete. It should not take long.

WHEREFORE, Amicus respectfully asks the Supreme Court to deny the petition for writ of certiorari.

March 22, 2001

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